NO. 47277-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CHASE McCRACKEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was there sufficient evidence to support the trial court's finding that the defendant committed the crime of malicious mischief third degree with sexual motivation where there was evidence that the defendant entered the victim's home through a doggie door and while inside, not only ate the victims food and juice, but also took off his clothing, got into her bed, and masturbated, leaving semen stains on both her sheets and her comforter?

2. Was there sufficient evidence for the trial court's finding that the defendant committed the crime of residential burglary with sexual motivation where there was evidence that the defendant entered the victim's house unlawfully for the apparent purpose of both eating her food and juice, but also in order to masturbate in her bed?

3. Did the trial court properly impose discretionary legal financial obligations without inquiring into the defendant's ability to pay?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On December 18 2013, the appellant, Chase McCracken, was charged by information with one count of Residential Burglary and one count of Malicious Mischief third Degree. CP 1-2. The charges were amended on January 2, 2014 to add sexual motivation aggravators to each count. CP 8-9.

On February 27, 2014 a CrR 3.5 hearing was held and the defendant also made a motion to dismiss the "sexual motivation" allegation under *State v. Knapstad*. The trial court denied the defendant's motion and admitted statements made to law enforcement. CP 10 and 11-20.

The defendant waived his right to a jury trial and a bench trial was held on August 27, 2014. CP 21. The defendant stipulated to certain facts. CP 22-36. Based on the stipulation and after argument from counsel, the trial judge found the defendant guilty of Residential Burglary with Sexual Motivation and Malicious Mischief with Sexual Motivation. CP 37.

Mr. McCracken was sentenced on February 26, 2015 to a sentence below the standard range. CP 66–83.

2. SUBSTANTIVE FACTS

Chase McCracken, between the dates of 11/2/13 and 11/5/13, entered the home of Cari Hastings in Carson, Washington. Mr. McCracken did not know the defendant, nor had he ever been invited into her home. He admitted to entering through the "doggie door." CP 23. Ms. Hastings reported that several items had been stolen from her home, including a gun, a laptop computer, some cash she'd left on her counter as well as candy and juice from her refrigerator. CP 30. Mr. McCracken admitted to eating her candy and drinking her juice. CP 23, 32. Mr. McCracken also admitted that after using her bathroom, he undressed, got into her bed in her master bedroom and masturbated, ejaculated and left semen stains on the sheets and comforter of the bed, damaging the sheets and comforter. CP 23-24, 32. Ms. Hastings discovered the stains on her bedding when she returned to her house several days later. CP 30-31. The semen stains were analyzed by the Washington State Patrol Crime Lab for DNA and matched the DNA of Chase McCracken. CP 24, 35.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS THE DEFENDANT"S CONVICTION FOR MALICIOUS MISCHIEF THIRD DEGREE WITH SEXUAL MOTIVATION.

Mr. McCracken argues that the State has failed to provide sufficient evidence that defendant committed the crime of malicious mischief in the third degree, specifically that the State has failed to provide sufficient evidence of the element of maliciousness. RCW 9A.04.110(12) defines the required mens rea for malicious mischief: '"Malice" and "maliciously" shall import an evil intent, wish or design to vex, annoy, or injure another person.' The definition also contains a permissive inference regarding malice: 'Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.' The State provided sufficient proof of the malice element of malicious mischief.

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. The evidence is reviewed in the light most favorable to the State. After a bench trial, an appellate court determines whether substantial evidence supports the trial court's

findings of fact, and then, whether the findings support the trial court's conclusions of law. Substantial evidence is evidence that would convince a fair-minded rational person of the finding's truth. State v. Stevenson, 128 Wn. App. 179, 114 P. 3d 699 (2005).

In this case, the evidence of malice is more than substantial. Taking the evidence in the light most favorable to the State, the defendant chose to steak from the victim, eating her food and drinking her juice, acts which certainly evince a wish or design to vex, annoy or injure, as the act of taking another person's property is certain to result in such feelings. Furthermore, the defendant chose to masturbate to ejaculation in the most intimate of locations in the victim's home, her bed. He did so in a place where it would certainly leave a stain that she would later locate. All of these facts support the fact that the defendant did the act knowingly and with malice. The permissive inference, that malice may be inferred from an act that is done in willful disregard of the rights of another, while also supporting the fact that the defendant acted with malice, isn't even necessary in this case. The evidence of the acts themselves, and the choices the defendant made in invading the victim's privacy and soiling the most intimate parts of her home are evidence enough of malice.

The appellant claims that the permissive inference is the only evidence of malice, and as such, the presumed fact (malice) must flow beyond a reasonable doubt from the presumed fact (e.g. willful disregard of the rights of another) . See State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010). But as is argued above, the permissive inference is not the only evidence the State relies on for proof of malice. The circumstances of the crime itself demonstrate malice. The choices the defendant made in committing the act are evidence of malice. CP 23-24. Furthermore, the trial judge recognized this when he made his findings. "So, he masturbated with the effect of ejaculation, and that was a willful disregard of the rights of another, privacy rights among other things. Definitely would be vexing and annoying and injurious. He knowingly and willfully did it, and it was wrongfully done without lawful excuse, so beyond a reasonable doubt, he's guilty of malicious mischief under $750." RP (8/27/14) 29. The trial judge made findings both in reference to the permissive inference and the definition of malice. The mere existence of other motivations (in this case, for example, sexual motivation) does not undermine proof of malice. A person can have more than one motivation for a single act. For example, when an arrested person breaks out of a police car by breaking the

window, evidence of malice is not undermined by evidence of a desire to escape. Neither is it undermined by other (possible) motives here.

For the above reasons, the State has supplied sufficient evidence that defendant acted with malice and furthermore that the trial judge's findings of fact support his conclusion that the defendant, Mr. McCracken is guilty of malicious mischief third degree with sexual motivation.

2. SUFFICIENT EVIDENCE SUPPORTS THE DEFENDANT'S CONVICTION FOR RESIDENTIAL BURGLARY WITH SEXUAL MOTIVATION.

Next Mr. McCracken argues that the State presented insufficient evidence to support a finding that he committed the crime of residential burglary with sexual motivation. '"Sexual motivation" means that *one of the purposes* for which the defendant committed the crime was for the purpose of his or her sexual gratification.' RCW 9.94A.030 (emphasis added). The State must prove beyond a reasonable doubt that the defendant committed the crime for the purpose of sexual gratification. It must do so with evidence of identifiable conduct by the defendant in committing the offense. State v. Vars, 157 Wn. App. 482, 237 P.3d 378 (2010).

Again, in a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from them. The evidence is reviewed in the light most favorable to the State. State v. Stevenson, 128 Wn. App. 179, 114 P. 3d 699 (2005).

In State v. Halstein, 122 Wn.2d 109, 857 P.2d 270 (1993) the Washington Supreme Court addressed a similar issue in the context of the nearly identical juvenile sexual motivation statute. In that case, it was found that where the Respondent broke into the victim's home and stole condoms and a vibrator, sufficient evidence supported his conviction for burglary with sexual motivation.

If this court finds that that the State provided sufficient evidence for proof beyond a reasonable doubt of the crime of malicious mischief third degree, then State v. Halstein is precisely on point. Moreover, the act of masturbation is even more clearly an act that is quintessentially for the purpose of sexual gratification than stealing prophylactics and sex toys. In fact, with the exception of those cases where masturbation is required for medical or donative reasons, there is scarcely any other conceivable purpose for the act. If the act of malicious mischief is essentially the act of masturbating onto a stranger's sheets and bedding, and if the

defendant entered or remained unlawfully in another person's home with the intent to do so, then the burglary is also motivated by sexual gratification.

But even if this court finds that the State failed to provide sufficient evidence of malice, and therefore the malicious mischief with sexual motivation conviction must be reversed, it may still find that the crime of residential burglary was sexually motivated. The sexual motivation statute only requires that "one of the purposes" for which the defendant committed the crime be sexual gratification. It does not require that the defendant's motives be purely sexual. In this case, defendant had more than one motivation for entering the home unlawfully and stealing the victim's food and soiling her bedding. He was hungry, and cold, and sexually aroused. The "evidence of identifiable conduct by the defendant in committing the offense" is the act of masturbation. The act alone, even if not also an act of malicious mischief, suggests that one motivation for entering and then remaining in the victim's home, unlawfully and with the intent to commit another crime (theft), was also to gratify himself sexually.

For the above reasons, the State has supplied sufficient evidence that Mr. McCracken committed the crime of residential burglary with sexual motivation.

3. RETURNING THE CASE TO THE TRIAL COURT SO THAT THE PROSECUTOR CAN VOLUNTARILY WITHDRAW THE SEXUAL MOTIVATION AGGRAVATOR IS NOT NECESSARY.

This case was filed December 18, 2013, the sexual motivation aggravator added January 2, 2014 and the stipulated facts trial did not occur until August 27, 2014. CP 1-2, 8-9, 37. The prosecutor has had plenty of time to consider the legislature's intent in creating the sexual motivation aggravator, its application in this case, the equitable considerations regarding this defendant, Mr. McCracken, and any concerns of the victim. While the prosecutor may have been unaware that State v. Rice, 174 Wn.2d 884, 279 P.3d 849 (2012) had given him the discretion to withdraw the allegation without the trial judge making specific findings, he certainly appeared to be aware of the fact that there was some path (judicial acquiescence) to withdrawing the allegation, and still chose not to take that path. RP (2/27/14) 6. It would be unfair and give

false hope to Mr. McCracken to expect that the additional period of time between trial and sentencing and this appeal will alter the exercise of that discretion. For this reason, the State opposes remanding the case for further proceedings.

4. THE TRIAL COURT PROPERLY IMPOSED THE VICTIM ASSESSMENT, THE DNA FEE, AND THE FILING FEE AS STATUTORY MANDATORY ASSESSMENTS OR FEES, NOT DISCRETIONARY COSTS SO WAS NOT REQUIRED TO CONSIDER OR MAKE A FINDING WITH RESPECT TO THE DEFENDANT'S ABILITY TO PAY.

For the first time on appeal, the Defendant challenges the court's imposition of legal financial obligations, arguing that the trial court failed to consider and make a finding with regard to the defendant's ability to pay costs.

The Washington Supreme Court has held that it is not error for a court of appeals to decline to reach the merits on a challenge to the imposition of LFO's made for the first time on appeal. "Unpreserved LFO errors do not command review as a matter of right under *Ford* and its progeny." The decision to review is discretionary on the reviewing court under RAP 2.5. State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). In other words, this

Court may continue to apply its decision in State v. Duncan, 180 Wn. App. 246, 327 P.3d 699 (2014).

The Defendant challenges the imposition of all Legal Financial Obligations (LFO's), but Blazina arguably only applies to imposition of discretionary costs. As the defendant points out in his brief, the three LFO's, the victim penalty assessment ($500), the DNA fee ($100) and the filing fee ($200) are all arguably mandatory assessments and/or fees, rather than discretionary costs. (See Appellant's brief, page 20.) In Blazina, the Court was specifically interpreting RCW 10.01.160. None of the LFO's imposed in Mr. McCracken's case were imposed under RCW 10.01.160, but rather RCW 7.68.035 (victim penalty assessment), RCW 36.18.020(h) (filing fee), and RCW 43.43.7541 (DNA fee). The court did not impose any discretionary costs, such as recoupment for the costs of his court appointed attorney, incarceration costs, or costs related to supervision on Mr. McCracken. CP 66-83. Because no discretionary costs were imposed on Mr. McCracken, no finding with respect to his ability to pay was necessary.

If this Court decides to exercise its RAP 2.5 discretion to address the unchallenged imposition of non-discretionary LFO's, and further finds that the trial court was required, and failed, to

consider Mr. McCracken's ability to pay the victim penalty assessment, the DNA fee, and the filing fee, the remedy is not to order the striking of costs, but rather, the remedy would be a remand to the trial court to make such a finding. State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

D. CONCLUSION

Sufficient evidence was presented to find the defendant, Chase McCracken, guilty beyond a reasonable doubt of the crime of malicious mischief third degree with sexual motivation and residential burglary with sexual motivation. There was substantial evidence supporting the "malice" element of malicious mischief third degree as well as the "sexual motivation" aggravator as applied to the crime of residential burglary. Returning the case to the trial court in the hopes that the prosecutor might reconsider his exercise of discretion with regard to the "sexual motivation" aggravator will unduly delay consideration of the merits of this appeal and all parties are better served by having a decision on the merits. Finally, the court properly imposed mandatory assessments and fees without making an individualized determination of the defendant's ability to pay. The court should affirm the defendant's conviction and sentence.

DATED this 1st day of December, 2015

RESPECTFULLY submitted,

By: _____
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SKAMANIA COUNTY PROSECUTOR

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